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IN THE

Supreme Court of the United States

October Term, 1947

FRANK A. THOMPSON, Trustee for the ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR,
Petitioner,

VS.

LOUISE CAMP, Administratrix of the Estate of Ervin (Irving) Camp, deceased,
Respondent.

No. 517

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF.

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symptoms still persisted and did not agree with the doctor's opinion, thereafter, when those same injuries cause his death, set aside the settlement on the ground of mutual mistake of fact on the basis that at the time of the settlement the parties, including the claimant believed he was well? 15

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FRANK A. THOMPSON, Trustee for the ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR,

Petitioner,

VS.

LOUISE CAMP, Administratrix of the Estate of Ervin (Irving) Camp, deceased,

Respondent.

No._____

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

SUPPORTING BRIEF.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner, Frank A. Thompson, Trustee for St. Louis-San Francisco Railway Company, Debtor, was sued in the United States District Court for the Western District of Tennessee by respondent, Louise Camp as administratrix of the estate of her deceased husband, Ervin Camp. The complaint sought a recovery for the wrongful death of Camp under the provisions of the Federal Employer's Liability Act (USCA, Title 45, Sections 51-60) of the damages alleged to have been sustained by the respondent as the widow and by their three minor children (R. 1-8).

The complaint sets forth that Camp was injured on April 26, 1945, through the negligence of petitioner and that a settlement of his claim was made with him by petitioner on June 2, 1945, for the sum of $500.00 and that subsequently on June 17, 1945, he died as the result of the injuries received on April 26, 1945. The complaint alleged that the settlement was the result of fraud and of mutual mistake of fact and sought to rescind the settlement and at the same time to recover damages for the alleged wrongful death.

The answer of petitioner denied the charges of the complaint and asserted the validity of the release and settlement.

The trial Judge submitted two special issues to the jury, one as to whether the settlement was the result of fraud, and the other as to whether it was the result of mutual mistake of fact, and instructed the jury that if they answered either issue "Yes," they should then proceed to determine the issues of negligence and damages.

The jury answered the issue as to fraud in the negative and the issue as to mutual mistake of fact in the affirmative and returned a verdict against the petitioner in favor of the respondent for $35,000.00.

The trial Judge approved the jury's verdict on both special issues and approved the general verdict and entered judgment thereon, and overruling petitioner's motion to set aside the jury verdict and for judgment notwithstanding that verdict.

On petitioner's appeal to the Circuit Court of Appeals for the Sixth Circuit that court reversed the case and remanded it for a new trial on the ground that the trial court had erred in failing to give an instruction tendered by petitioner, but refused to dismiss the case and overruled certain other specifications of error made by petitioner. The opinion of the Circuit Court of Appeals appears at Page 604 of the record and is reported under the style of Thompson v. Camp, 163 F. (2) 396.

Camp, a switchman in the employ of petitioner, was injured on the night of April 26, 1945 while engaged in switching operations in certain yards at Memphis, Tennessee. He was taken to the hospital where his injuries were diagnosed as a concussion of the brain with laceration of the brain tissue resulting in some hemorrhage into the spinal column.

He remained in the hospital until May 9, 1945 at which time he returned to his home, but did not return to his employment. On June 2, 1945, after a visit to the doctor's office, he was told by the doctor that he was "O. K., he could go back to work" (R. 65).

His wife was with him at the time and her testimony is to the effect that Camp was still suffering from headaches and dizzy spells to some extent and that neither she nor Camp agreed with Dr. Hendrix' opinion, but decided to act on his opinion with the result that Camp contacted the Claim Agent of petitioner on the same day, gave a statement as to how the accident had happened and signed a release settling his claim against petitioner for the sum of $500.00 which was paid to him at that time.

He returned to work on June 4, 1945 and worked intermittently until June 17, 1945 at which time he fainted while engaged in his employment and located on an engine. He did not recover consciousness and died the next morning. Both the District Court and the Circuit Court of Appeals have concurred in the jury verdict to the effect that his death was the result of his injuries on April 26th.

The release which was signed on June 2, 1945 is as follows:

"Frank A. Thompson, Trustee.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
DR. GENERAL RELEASE

"WHEREAS, I, Ervin R. Camp, of 3028 Carnes Avenue, Memphis, Tennessee, was injured on the 26th day of April, 1945, at or near Memphis, Tennessee, on a line of railroad operated or used by Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor (hereinafter called 'Trustee'), while working as switchman near K. C. Junction I fell, while alighting from a moving cut of cars, under circumstances which I claim render

said Trustee liable in damages, although such liability is denied by said Trustee, and, the undersigned being desirous to compromise, adjust and settle the entire matter:

"NOW, THEREFORE, in consideration of the sum of:

"Five Hundred and no/100 DOLLARS ($500.00) to me this day paid by said Trustee, the receipt of which is hereby acknowledged, I do hereby compromise said claim and do release and forever discharge said Trustee, his successor or successors, agents and employees, from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent, and also do release and discharge them of all suits, actions, causes of action and claims for injuries and damages which I have or might have arising out of the accident above referred to, both to my person and property, as well as from all claims or demands of any kind whatsoever, and do hereby acknowledge full satisfaction of all such liability and causes of action.

"This release is executed by me solely for the consideration above expressed, without any other representation whatsoever, and without any agreement or obligation on the part of said Trustee, his successor or successors, for my future employment.

"I further represent and covenant that at the time of receiving said payment and signing and executing this release, I am of lawful age and legally competent to execute it, and that before signing and executing it I have fully informed myself of its contents and executed it with full knowledge thereof.

"I have read and understand this release.

"Given under my hand and seal this 2nd day of June, A. D. 1945.

(Signed) Ervin R. Camp.

WITNESS:
Mrs. Ervin R. Camp,
Address: 3028 Carnes Ave.,
Memphis, Tenn.
T. R. Kehoe,
Address: 1173 Tutwiler,
Memphis, Tenn.
H. W. Westbrooke."
R. 12, 13, 14.

Mrs. Camp, the respondent, testified as follows with respect to what occurred when she and Camp visited the doctor on June 2nd:

"Q At the time Mr. Camp signed the release did or not you and Mr. Camp believe he was able to go back to work?

A No, sir; we didn't. He just felt like he had to because we didn't have any money."
R. 68.

She also testified that Camp was anxious to get back to work as soon as the doctor thought he was able because he had responsibilities. She testified specifically as follows:

"Q And when this occurred, and when you talked with Dr. Hendrix, Dr. Hendrix said he would be OK, or 'You are OK, go back to work', I believe you said on direct examination, that you did not agree, and Mr. Camp did not agree, that he was all right, and able to go back to work?

A I didn't. Still, I thought the doctor knew what he was talking about.

Q So that Dr. Hendrix said 'OK, go back to work,' and you and Mr. Camp did not agree with that, but he went on back to work anyhow?

A There was nothing else he could do but go back to work."
R. 93, 94.

She also testified that at that time Camp told Dr. Hendrix he was still having headaches and dizzy spells. R. 92-93.

The medical evidence was to the effect that after injuries such as Camp had received there was no absolute way to tell that he had completely recovered; that in most cases where the subjective and objective symptoms had quieted down the injuries were cured, but that in some cases there might still be a slight internal hemorrhage, and that if this continued, it would build up a pressure which would finally result in death if it were not promptly recognized and dealt with, and that this was what occurred in Camp's case.

Under this evidence it was petitioner's position that there was no mutual mistake of fact upon which to base a recission of the release since Camp himself, as indicated in Mrs. Camp's evidence, did not believe that he was well and able to go back to work and since even if he did, no mistake of present fact was involved, but merely a mistake as to the future development of his admittedly known injuries.

It was also petitioner's position that in any event the settlement could not be set aside on the ground of mutual mistake of fact because it had been made in the light of a dispute between the parties as to liability and because Camp had specifically contracted in the release against injuries which might thereafter develop as well as those apparent at the time the settlement was made.

Petitioner was overruled in all of these matters by the Circuit Court of Appeals.

During the trial plaintiff offered evidence of the amount for which an insurance company would sell an annuity without refund to a person forty years of age which would pay him $3,000.00 a year until his death. This evidence was admitted by the trial court over the objection of the petitioner.

The Circuit Court of Appeals held that this evidence was properly admitted if coupled with a proper charge (R. 613-614) and while subsequently holding (R. 615) that the proper charge had not been given and reversing and remanding for that reason, it nevertheless held the evidence in question admissible.

STATEMENT AS TO BASIS OF JURISDICTION

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended (28 USCA, Sec. 347). The judgment of the Circuit Court of Appeals was entered on August 11, 1947 (R. 603). Petitions for rehearing filed by both petitioner and respondent were overruled by the Circuit Court of Appeals on October 7, 1947 (R. 643).

QUESTIONS PRESENTED

I.

A man receives certain known physical injuries and the doctor, believing that his injuries are cured, tells him that he is OK and can go back to work. Although he does not agree with the physician and still complains of symptoms, he goes back to work and also settles his claim for injuries under the Federal Employer's Liability Act. When it later develops that his injuries were not cured and he dies from those injuries, can his administratrix

then rescind the settlement on the ground of mutual mistake of fact in view of the fact that he admittedly did not believe the doctor's opinion that he was well at the time that he settled his claim?

II.

Where a man has received injuries the nature of which is known and it is believed by the parties that those injuries are cured and a settlement of his claim for damages under the Federal Employer's Liability Act is then made but it later develops that his injuries were not completely healed and he dies from those same injuries, can the settlement be avoided on the ground of mutual mistake of present fact, or has there been merely a mistake as to the duration of a known injury?

III.

Where a claim is made for personal injuries and a dispute exists as to liability and a settlement is made and a release signed which states not only that the liability is disputed but that the injured party releases the tort feasor "from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent," can the release subsequently be set aside on the ground of mutual mistake of fact when it develops that the admittedly known injuries which were then thought to have been healed were not in fact healed and subsequently such injuries caused his death?

IV.

In a suit for damages under the Federal Employer's Liability Act for the alleged wrongful death of the plaintiff's intestate, is evidence of the charge made by an in-

surance company for an annuity without refund admissible in evidence?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I.

Important questions with respect to the validity of a release of a claim for damages under the Federal Employer's Liability Act are presented. Confusion has existed in the past as to whether a belief by the parties that the injured person is well and cured of known injuries is a belief as to present fact or as to the future development of known injuries. This confusion exists in the decisions of the various Circuit Courts of Appeal. The Circuit Court of Appeals in the instant case has held that under such circumstances there is a mutual mistake of present fact.

II.

An important question the decision of which will influence all settlements under the Federal Employer's Liability Act is presented by the fact that the Circuit Court of Appeals in this case has held that the plaintiff might rescind for mutual mistake of fact a release providing that the releasor is releasing all claims for all injuries including those that may hereafter develop as well as those now apparent, and has also held that the fact that there existed between the parties at the time the settlement was made a dispute as to liability would not prevent such rescission.

III.

An important question of the admissibility of evidence, applicable in all death cases under the Federal Employ-

er's Liability Act, and possibly in other cases, is presented in that the Circuit Court of Appeals has held that evidence of the amount for which a life insurance company would sell a contract of annuity without refund to a person of a given age is relevant and admissible on the question of damages in such actions.

PRAYER

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals of the Sixth Judicial Circuit commanding that court to certify and send to this court for review and determination on a day certain to be named therein a full and complete transcript of the record and proceedings in the case entitled and numbered on its docket "Frank A. Thompson, Trustee for the St. Louis-San Francisco Railway Company, Debtor, Defendant-Appellant vs. Louise Camp, Administratrix of the Estate of Ervin (Erving) Camp, Deceased, Plaintiff-Appellee, No. 10362" to the end that said case may be reviewed and determined as provided in Section 240(a) of the Judicial Code as amended (28 USCA, Sec. 347), and that the judgment of the Circuit Court of Appeals for the Sixth Circuit reversing and remanding said cause for a new trial be reversed by this Honorable Court and that said cause be dismissed, or in the alternative, that so much of the opinion of the said Circuit Court of Appeals for the Sixth Circuit as holds that evidence of the amount for which a life insurance company would sell an annuity without refund to a person of a given age is admissible in an action for wrongful death under the Federal Employer's Liability Act be reversed; and that your peti-

tioner have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE LOWER COURTS

No formal opinion was delivered by the District Court. The order of the District Court overruling petitioner's motion to set aside the verdict and for judgment, or in the alternative for a new trial and entering judgment against petitioner in favor of respondent is found at Record Pages 592-593.

The opinion of the Circuit Court of Appeals is found at Page 604 of the record and is reported under the style of Thompson v. Camp, 163 F. (2) 396.

The judgment of the Circuit Court of Appeals is found at Page 603 of the record.

The judgment of the Court of Appeals overruling the petitions for rehearing filed by both parties is found at Page 643 of the record.

JURISDICTION

A statement of the basis of jurisdiction in this cause is found at Page 8 of the foregoing petition for writ of certiorari.

STATEMENT OF THE CASE

See Summary statement of Matters Involved at Page 2 of the foregoing petition for writ of certiorari.

SPECIFICATION OF ERRORS

I.

The Circuit Court of Appeals for the Sixth Circuit erred in remanding this cause for a new trial rather than dismissing the cause. This was error because:

1. When the parties settled Camp's claim for injuries under the Federal Employer's Liability Act they were not laboring under a mistake of present fact. This was true not only because Camp did not agree with the doctor when he told him that he was all right and could go back to work, but also because the doctor's opinion under the circumstances, that is, Camp's continued symptoms of headaches and dizzy spells, necessarily amounted merely to an opinion as to his future progress and as to the future development of his known injuries.

2. When Camp settled his claim and signed the release not only was there an existing dispute between the parties as to liability, but the release itself provided for the discharge of all claims for all injuries including those that might thereafter develop as well as those then apparent.

II.

The Circuit Court of Appeals erred in holding that the evidence of the witness Pritchartt with respect to the price for which a life insurance company would sell a contract of annuity without refund to a person of given age was admissible under any circumstances. This was error because the price for which an insurance company would sell such a contract was based not only upon a preferred risk class to which Camp did not belong, but nec-

essarily included a substantial element of profit to the company and was wholly irrelevant on the question of damages.

ARGUMENT

I.

CAN THE ADMINISTRATRIX OF A CLAIMANT UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT WHO RECEIVED CERTAIN KNOWN PHYSICAL INJURIES AND WHO SETTLED HIS CLAIM AGAINST HIS EMPLOYER AFTER HIS PHYSICIAN HAD ADVISED HIM THAT HE WAS ALL RIGHT AND COULD GO BACK TO WORK ALTHOUGH THE CLAIMANT HIMSELF KNEW THAT HIS SYMPTOMS STILL PERSISTED AND DID NOT AGREE WITH THE DOCTOR'S OPINION, THEREAFTER, WHEN THOSE SAME INJURIES CAUSE HIS DEATH, SET ASIDE THE SETTLEMENT ON THE GROUND OF MUTUAL MISTAKE OF FACT ON THE BASIS THAT AT THE TIME OF THE SETTLEMENT THE PARTIES, INCLUDING THE CLAIMANT BELIEVED HE WAS WELL?

There is, of course, no dispute but what releases for personal injuries under certain conditions may be set aside. It is well settled, however, that where the ground for setting aside the release is mutual mistake of fact, the mistake must be with reference to a past or present fact. Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913 (C. C. A. 8).

The question is then presented as to whether the parties in this case, when the settlement was made on

June 2, 1945, were acting under any mistake of present or past fact. There is no contention that there was any mistake of a past fact. The respondent's position has constantly been that the parties were acting under a mistake of present fact in that they believed Camp was well and able to go back to work.

It would seem elementary that in order to maintain this position the evidence would have to show that Camp believed that he was well and able to go back to work. It is therefore somewhat surprising to find that the evidence instead supports the exact contrary.

Mrs. Camp, the administratrix and widow, testified that on June 2nd when she and Camp visited Dr. Hendrix' office for the purpose of having Camp examined, that a part of his examination consisted of talking with Mr. Camp and inquiring as to how he felt and that Mr. Camp at that time told Dr. Hendrix that he was still having headaches and dizzy spells (R. 92-93). It was her position all along that Camp's symptoms had never ceased.

She also testified as follows:

> "Q At the time Mr. Camp signed the release, did or not you and Mr. Camp believe he was able to go back to work?
>
> A No, sir; we didn't. He just felt like he had to, because we didn't have any money."
>
> R. 68.

Again she testified:

> "Q And when this occurred, and when you talked with Dr. Hendrix, Dr. Hendrix said he would be OK, or 'You are OK, go back to work,' I believe you said on direct examination, that you did not agree, and Mr. Camp did not agree, that he was all right, and able to go back to work?

A I didn't. Still, I thought the doctor knew what he was talking about.

Q So that Dr. Hendrix said 'OK, go back to work', and you and Mr. Camp did not agree with that, but he went on back to work anyhow?

A There was nothing else he could do but go back to work."

R. 93, 94.

The only inference which can be drawn from this testimony is that Camp, at the time he made the settlement on June 2, 1945, had been told by the doctor that he was all right and able to go back to work, but that he himself did not agree with the doctor, but in view of the doctor's opinion was willing to go on back to work.

It seems somewhat strange for the respondent then to take the position that Camp did believe that he was well and able to go back to work. That position, of course, was necessary in order to successfully set aside the release on the ground of mistake of fact, but that position clearly is not supported by the evidence when she herself testifies that Camp did not believe that he was all right and did not agree with the advice of the physician.

II.

WHERE A MAN HAS RECEIVED INJURIES THE NATURE OF WHICH IS KNOWN AND ALTHOUGH HIS SYMPTOMS STILL PERSIST, HE IS ADVISED BY THE PHYSICIAN THAT HE IS WELL AND CAN GO BACK TO WORK AND AS A RESULT OF THAT ADVICE HE SETTLES HIS CLAIM FOR DAMAGES UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT AND IT THEREAFTER DEVELOPS THAT HIS INJURIES WERE NOT WELL AND HE DIES FROM THOSE SAME INJURIES, CAN THE SETTLE-

MENT BE AVOIDED UPON THE GROUND OF MUTUAL MISTAKE OF PRESENT FACT OR HAS THERE BEEN MERELY A MISTAKE AS TO THE DURATION OF A KNOWN INJURY?

As pointed out before, the testimony of the respondent, Mrs. Camp, is to the effect that when Camp appeared in Dr. Hendrix' office for his last examination on June 2, 1945, he was still having headaches and dizzy spells and so advised Dr. Hendrix (R. 92-93). At that time Dr. Hendrix, after concluding his examination, advised Camp that he was all right and could go back to work.

It is the petitioner's position that under these circumstances, even conceding that the parties believed the opinion of Dr. Hendrix (which Mrs. Camp said they did not) still they were laboring under no mistake of present fact, but merely under a mistake in the opinion of the physician as to how long Camp's injuries and resulting symptoms would remain and what effect upon his condition going back to work would have.

It seems obvious that when a patient's symptoms still continue particularly to the extent where, as in Camp's case, he still had headaches and dizzy spells from a blow on the head and a doctor advises him that he is "OK and can go back to work" necessarily he is being given the opinion of the physician that he will recover and that going back to work will not hurt him. Conceding for the purpose of this argument that an outright opinion that a man is well where no symptoms persist might conceivably be considered as the expression of a present fact, nevertheless it would seem apparent that where the symptoms persist and a man does not feel well that an opinion to the effect that he is all right and can go back

to work could never be anything but an opinion of the physician that going back to work will not hurt him and that he will recover completely in due course.

That this was the effect of the opinion of Dr. Hendrix and that it was so understood by Camp is further evidenced by the fact that neither Camp nor Mrs. Camp agreed with the physician when he gave this opinion, but Camp decided that he would go ahead and go back to work and would also settle his claim. It is inconceivable that Camp, knowing that his headaches persisted and that his dizzy spells still continued and still feeling badly to such an extent that he disagreed with the physician's opinion that he was all right and could go back to work, could have drawn any conclusion from that opinion except that it would not hurt him to go back to work and that he would ultimately recover.

In the case of Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913, the court said:

> "A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing. Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 28 C. C. A. 358, 361, 83 Fed. 437, 440; Insurance Co. vs. Nelson, 103 U.S. 544, 548, 549, 26 L. Ed. 436; Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Howland v. Blake, 97 U. S. 624, 626, 24 L. Ed. 1027; Insurance Co. v. Henderson, 16 C. C. A. 390, 392, 69 Fed. 762, 765. Again, it is not every mistake that will lay the foundation for the recission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion, or by a mistake in belief relative to an

uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury,, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties."

This case has been a leading case upon this question for many years. The Circuit Court of Appeals says that the rule is different in the Sixth Circuit citing Lumley v. Wabash R. Co., 76 F. 66 as authority for this position, and in the opinion the Circuit Court of Appeals quotes from the Lumley case as follows:

"If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release. We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received cer-

tain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release woud not have been signed."

It is apparent that the case is not authority for the position of the Circuit Court of Appeals for the reason that, as stated in the Circuit Court of Appeals' opinion (R. 608), the mistake there was that the patient had a fractured and dislocated shoulder which the physician failed to discover. It was thought that the pain in the shoulder originated from another injury.

It is clear from this statement and from the opinion of the court in the Lumley case that the release was set aside because of this mistake on the part of the parties as to the nature of the injury.

In the present case there was no question about what the injury was. The only mistake was as to whether the internal hemorrhage from that injury had ceased.

The Circuit Court of Appeals in its opinion (R. 610) makes it clear that the physician's opinion was one as to the future progress of the matter and that Camp so understood. The court says:

"Camp relied upon the doctor's opinion, at least with respect to the fact that his recovery was practically compete, that he could safely return to work

> and did not require any further medical attention, and that there would not be any subsequent, unexpected developments."

The court goes on to say that in acting under this belief Camp was acting under a mistake of fact. It seems clear to us that he was not acting under a mistake of fact, but was acting under a mistaken belief that the doctor's opinion as to the future development of his condition was sound. It is difficult to formulate language which would more clearly constitute an opinion as to the future condition of things than the language used by the Circuit Court of Appeals with respect to Camp's belief on this occasion, and we submit that the court was in error in holding that the parties acted under any mistake of fact and in refusing to uphold the validity of the release under these circumstances.

III.

WHERE A CLAIM IS MADE FOR PERSONAL INJURIES AND A DISPUTE EXISTS AS TO LIABILITY AND A SETTLEMENT IS MADE AND A RELEASE SIGNED WHICH STATES NOT ONLY THAT THE LIABILITY IS DISPUTED BUT THAT THE INJURED PARTY RELEASES THE TORT FEASOR "FROM ANY AND ALL LIABILITY FOR ALL CLAIMS FOR ALL INJURIES, INCLUDING THOSE THAT MAY HEREAFTER DEVELOP AS WELL AS THOSE NOW APPARENT," CAN THE RELEASE SUBSEQUENTLY BE SET ASIDE ON THE GROUND OF MUTUAL MISTAKE OF FACT WHEN IT DEVELOPS THAT THE ADMITTEDLY KNOWN INJURIES WHICH WERE THEN THOUGHT TO HAVE BEEN HEALED WERE NOT IN FACT AND SUBSEQUENTLY SUCH INJURIES CAUSED HIS DEATH?

The release in question read as follows:

"WHEREAS, I, Ervin R. Camp, of 3028 Carnes Avenue, Memphis, Tennessee, was injured on the 26th day of April, 1945, at or near Memphis, Tennessee, on a line of railroad operated or used by Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor (hereinafter called 'Trustee'), while working as switchman near K. C. Junction I fell, while alighting from a moving cut of cars, under circumstances which I claim render said Trustee liable in damages, although such liability is denied by said Trustee, and, the undersigned being desirous to compromise, adjust and settle the entire matter:

"NOW, THEREFORE, in consideration of the sum of:

"Five Hundred and no/100 DOLLARS ($500.00) to me this day paid by said Trustee, the receipt of which is hereby acknowledged, I do hereby compromise said claim and do release and discharge said Trustee, his successor or successors, agents and employees, from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent, and also do release and discharge them of all suits, actions, causes of action and claims for injuries and damages which I have or might have arising out of the accident above referred to, both to my person and property, as well as from all claims or demands of any kind whatsoever and do hereby acknowledge full satisfaction of all such liability and causes of action.

"This release is executed by me solely for the consideration above expressed, without any other representation whatsoever, and without any agreement or obligation on the part of said Trustee, his successor or successors, for my future employment.

"I further represent and covenant that at the time of receiving said payment and signing and executing this release, I am of lawful age and legally competent to execute it, and that before signing and executing it I have fully informed myself of its contents and executed it with full knowledge thereof.

"I have read and understand this release.

"Given under my hand and seal this 2nd day of June, A. D. 1945.

(Signed) Ervin R. Camp"
R. 12, 13, 14.

It will be observed that not only does the release contain a provision to the effect that Camp is releasing all claims for all injuries including those "that may hereafter develop as well as those now apparent" but said release also contains a provision to the effect that there is a dispute as to liability between the parties.

In addition, the testimony of both Mrs. Camp and Mr. Westbrooke was to the effect that at the time the settlement was made there did exist an actual dispute between the parties as to liability (R. 66, 431, 438). It is our position that under these circumstances it is not sound to say that the release can be set aside and held void because of an alleged mutual mistake of fact as to whether or not Camp was well at the time he signed the release.

The Circuit Court of Appeals in its opinion did not discuss this point although the point was made, briefed and argued. It seems clear under the authorities that the release should be upheld under these circumstances Richardson v. C. M. & St. P. R. R. Co., 157 Minn. 474, 196 N. W. 643; Cogswell v. Boston & Maine R. R. Co., 78 N. H. 379, 101 Atl. 145; Sitchon v. American Export Lines, 113

F. (2) 830 (C. C. A. 2); Serr v. Biwabik Concrete Aggregate Co., 202 Minn. 165, 278 N. W. 355; Berry v. Struble, 20 Cal. App. (2) 299, 66 P. (2) 746; Moses v. Carver, 164 Misc. 204, 298 N. Y. Supp. 378, affirmed 254 App. Div. 402, 5 N. Y. Supp. (2) 783; McIsaac v. McMurry, 77 N. H. 466, 93 Atl. 115; Quebec v. Gulf C. & S. F. R. Co., 98 Tex. 6, 81 S. W. 20; 45 Am. Jur., Release, Secs. 19, 20; 53 C. J. Release, Sec. 30.

Giving to the plaintiff the benefit of all evidence in the plaintiff's favor and the benefit of all disputes in the testimony, the strongest that can be said is that when Camp executed the release he knew that he had had a concussion of the brain with a laceration of the brain tissue and a resulting hemorrhage into his spinal column. Both parties under the plaintiff's view of the evidence thought that this condition had been corrected and that Camp was all right at the time the release was signed, but it subsequently developed that he had not been completely cured since there was a slight hemorrhage remaining which in time built up a sufficient pressure to cause his death.

Mrs. Camp as administratrix, which in effect is the same as Camp himself, now says that if that fact had been known at the time the release was signed, it would not have been signed.

Conceivably that might be true. The fact remains, however, that the release itself contains a clause specifically stating that the release is to cover all injuries including those which may develop thereafter as well as those apparent at the time the release was signed. Obviously, this clause was included in the release for the

specific purpose of providing against the contingency that there might be some unknown injury or some unknown condition existing at the time the settlement was made.

To get at the proposition a little more clearly let us suppose that the release had read in part as follows:

> "We believe that the injury sustained by Camp is cured now, but should it develop in the future that such injury is not cured and should the undersigned Camp subsequently die from the effects of said injury, the undersigned Camp still releases all claims therefor."

Could it be successfully argued that this release could be set aside on the basis of mutual mistake of fact when it subsequently developed that the known injury was not cured as supposed? Certainly it would not seem so because it is clear that one of the very subjects of the contract was the release of the company from any liability because of such unknown conditions. In other words, the releasor under such a release would clearly be contracting to take the risk that he might no be well.

Yet the release in the present case, while not couched in the same words, is identical in tenor and substance. The clause in question could have no effect if not that which we have ascribed to it. Its only purpose could be that of eliminating the possibility that the company would have to pay again because of the development of unknown conditions presently existing.

It seems to us that if the release in the present case is not effective to provide against such a situation, then it is not humanly possible to draft a release which would have that effect.

We concede, of course, that a release, under proper circumstances, may be set aside because of a mutual mistake of a present or past fact. Likewise we concede that such mistake may extend to the nature or extent of the injuries. On the other hand, surely it cannot be disputed that the parties may validly contract so as to cast upon the employee the risk that the parties are not fully acquainted with the actual nature and extent of the employee's injuries. The court will find from an examination of the cases that almost without exception the cases where releases have been set aside under such circumstances involved releases referring to specific injuries and containing general language as to the release and not containing specific clauses releasing claims for future developments or for unknown injuries. The contention may logically be made in those cases that the parties were not contracting against the possibility of unknown injuries or against the possibility of a mistaken belief as to the nature or extent of known injuries.

Where, however, the release contains a specific clause referring to such unknown injuries or injuries to develop in the future, there would seem to be no logical basis for saying that the employee may set aside the release because he later learns that such unknown injuries existed or that his known injuries were worse than he anticipated.

The same result must follow where the release is made pursuant to a dispute as to liability. That this was the case here is not disputed because as pointed out, not only does the release contain such a provision, but the parties testified that that dispute existed. The court lays emphasis on the fact that the amount paid in settlement of

the claim was not greatly in excess of the time which Camp had lost. We recognize that some cases have referred to this as a material element, yet the fact remains that if there was no liability for the injury, then the defendant would not have owed Camp even the amount of his lost time. It may be argued that if Camp had known that he was not well and that his condition might become aggravated in the future, he would not have settled for $500.00. On the other hand, the defendant was denying any liability and it may well have been that even if Camp had known that his condition was not entirely well, he would still have settled for $500.00 rather than take the chance that he would get nothing whatever. There is no way to determine that fact because Camp cannot testify and regardless of what Mrs. Camp would like to say, she, of course, cannot testify as to Camp's impressions and his thoughts. The cases herein cited sustain the proposition which we have argued here, and we believe that under the facts they are peculiarly applicable to this case.

IV.

IN A SUIT FOR DAMAGES UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT FOR THE ALLEGED WRONGFUL DEATH OF THE PLAINTIFF'S INTESTATE, IS EVIDENCE OF THE CHARGE MADE BY AN INSURANCE COMPANY FOR AN ANNUITY WITHOUT REFUND ADMISSIBLE IN EVIDENCE?

Over objection of the petitioner respondent introduced evidence of the witness Pritchartt as follows:

"Q Does your company, and others, sell annuities?

A Yes, sir.

Q What would it cost—

MR. TURNER: I object to any question about what an annuity would cost, of any kind or character. It is not proper under any issue in the lawsuit as to what you might have to pay to get an annuity.

THE COURT: It is not controlling, but it is for the jury to consider that type of evidence, I think.

MR. TURNER: I submit it is not evidence, the fact as to what it would cost to buy an annuity from some insurance company.

MR. ARMSTRONG: I state that it is.

MR. TURNER: The evidence that is admissible on the issue that is involved is what is the reasonable cash value of the contributions that are reasonably to be expected. Now, that has not anything in the world to do with what an annuity would cost. It is simply what is the present cash value of what might reasonably be expected to be his contributions.

MR. ARMSTRONG: The United States Supreme Court has passed on it; so has the Sixth Circuit. We have had it up here in other cases.

THE COURT: I think it is competent.

MR. TURNER: Note an exception.

Q When I asked about an annuity, I mean where there is no money left at the end of the time, so it is a completed period. What would it cost to buy an annuity, a man of thirty-three years of age, of three thousand dollars a year?

A The annuities sold at those ages, Mr. Armstrong, are so rare that the figure below forty is not quoted in the book.

Q What have you to say as to that?

A Man, or woman?

MR. ARMSTRONG: Man.

THE WITNESS: You mean what would it cost to buy an annuity without refund, for what amount?

MR. ARMSTRONG: No; for an annuity to produce three thousand dollars a year, would be a completely absorbed annuity.

A If this calculation is correct, $74,520.00.

Q Of course, the younger a man is, the longer his life expectancy?

A Well, yes, according to the experience tables.

Q So that the younger he is, the more the annuity would cost?

A That is true.

Q Now, when the expectancy—can you get the expectancy there—when a man has an expectancy we will say, of thirty-two years—you can look at it there—how old would he be when he had an expectancy of thirty-two years?

A At age thirty-four, there is an expectancy of 32.5.

Q At forty, what is the expectancy?

A 28.2.

Q When the expectancy was as much as 32 years, what would be the cost of an annuity? It would be more than $72,000.00, wouldn't it?

A Wait a minute. I don't quite follow you.

Q All right. When a man is forty years of age, he has an expectancy of how many years, Twenty-eight?

A When a man is forty years old, he has an expectancy of 28.2.

Q And an annuity of three thousand dollars a year would cost how much money, at that time?

A How much per hundred?

MR. ARMSTRONG: Yes.

A $2,484.00.

Q And the total amount would be how much?

A $74,520.00.

Q Now, the main point is, the longer the expectancy, the greater the cost of an annuity, is that it?

A Yes, except those are reckoned by the cost of annuity at the time of application. If they were younger than forty, it would be presumed they would have a longer expectation of life than a man who has already attained forty.

MR. ARMSTRONG: All right, I see. The higher the cost of the annuity. That is all.—"

R. 285-288.

"Q Could a man thirty-two years old buy an annuity for life for any less than seventy thousand dollars?

A No, it would cost him more."

R. 292.

It is petitioner's position that not only is this evidence inadmissible because as shown by other testimony of the witness Pritchartt (R. 290, 291), the cost of such annuity contracts is based upon an entirely different classification from the ordinary mortality or annuity tables and based upon a classification which essentially is a preferred risk classification and to which a man in Camp's position would not belong, but also because the amount for which an insurance company would sell such a contract involves many immaterial elements including particularly a large element of profit to the company and would be wholly irrelevant on the issue of damages.

There are standard annuity tables based upon standard mortality tables which are admissible in evidence on the issue of the present cash value of contributions or income to be received at stated intervals in the future for a given length of time. Concededly those tables would be admissible in evidence, but a wholly different result is reached under those tables and under the tables setting forth the prices for which a life insurance company would sell such a contract.

There is a dearth of authority upon this question apparently occasioned by the fact that parties have never considered such evidence relevant. The Circuit Court of Appeals in holding that this evidence was admissible

under a proper charge (R. 614) cited a number of cases only one of which in anyway involved this question. This is the case of Baltimore & O. R. Co. v. Henthorne, 73 F. 634. The Court of Appeals for the Sixth Circuit in that case, decided in 1896, did hold that the price of such an annuity contract was a proper measure of damages. It did so without any extended discussion and without the citation of any authority.

To the contrary is the case of Goodhart v. Penn. R. Co., 35 Atl. 191, 177 Pa. 1 where the question was squarely presented and where the court said, in discussing the effect of the jury verdict in favor of the plaintiff that "it assumes in the fourth place, that he is entitled to recover, not only the present worth of his future earnings, as the jury has estimated them, but a sufficient sum to enable him to go out into the market and purchase an annuity now, equal to his estimated earnings. The first, second and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums."

35 Atl., p. 193.

So here in a case under the Federal Employer's Liability Act the plaintiff is not entitled to a sum of money which would enable her to go out into the market and enter into a contract with some life insurance company or with any other person under which that company would agree to pay her a stated sum for the rest of her expectancy or for the rest of her deceased husband's expectancy had he lived, whichever might be the shorter.

At the most she would be entitled to the present cash value of the contributions which she might reasonably have expected had her husband lived. But it is clear that the present cash value of those contributions would not be sufficient to purchase her an annuity contract under which a life insurance company would pay her those reasonably to be expected contributions. Added to that figure would necessarily be a substantial sum necessary to assist the company in the payment of its overhead and expenses and to allow it a profit.

It seems clear that under these circumstances evidence of the price for which an insurance company would sell such a contract has no bearing upon the issues in a suit of this character and can serve only to inflate the ideas of a jury as to the amount of money which the plaintiff should have in lieu of the reasonably to be expected contributions.

We submit therefore that the Circuit Court of Appeals was in error in holding that this evidence was admissible under a proper charge or otherwise, and should have held that the evidence was not admissible and that it was prejudicial and should have reversed this case on that ground, and this court should now do so.

CONCLUSION.

It is submitted in conclusion that the questions presented in the petition for writ of certiorari are substantial questions having a constant application in suits under the Federal Employer's Liability Act and that these questions should be passed upon and determined by this court and that accordingly the petition should be granted and the erroneous action of the Circuit Court of Ap-

peals for the Sixth Circuit corrected in the respects pointed out.

Respectfully submitted,

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